

US.Pat.Ap.Nr: 10/757,733

Docket: 616-76US

Applicant: Shelp+

REQUEST FOR RECONSIDERATION

1. We filed a petition 15 January 2004, requesting that this patent application be accorded a filing date of 16 September 2003.

In his letter dated 07 May 2004, Mr Douglas I. Wood, for the PTO Office of Petitions, dismissed our petition.

This is a request for reconsideration of the Dismissal.

2. It is our position that we did file the patent application papers, by hand, (actually by Federal Express courier service), at the PTO, on 16 September 2003.

There are two elements to our proving that we did do so:-

element (a): we must show that we did indeed deposit an envelope at the PTO, and

element (b): we must show that the envelope did indeed contain patent application papers.

As we understand the Dismissal, Mr. Wood acknowledges that we submitted a delivery shipment at the PTO at 11.15am on 16 September 2003. That is to say, Mr. Wood acknowledges that we have proved element (a) above.

What Mr. Wood alleges is that we have not proved element (b), i.e we have not proved that the delivery shipment we submitted 16 September 2003 contained the application papers relating to this case.

3. In the Dismissal, Mr. Wood sets out in detail some highlights of the MPEP 503 return-postcard procedure. We feel this is rather irrelevant, since we are not proffering a return-postcard in this case. However, we make the following comments.

Some people feel it is rather imprudent to place reliance on the return-postcard procedure. Given that the PTO does indeed lose hand-delivered

envelopes, how can people be sure the PTO will not lose the envelope before the PTO has mailed the return-postcard? Plus, even a properly-mailed return-postcard might get lost in the mail. Plus, the PTO might have made a mistake in filling out the return-postcard.

The prudent applicant must therefore take steps to make sure they can prove delivery of the full patent application papers, even without the return-postcard.

But then, given that the applicant has some system in place that is geared to providing the required proof in the absence of the return-postcard, what is the point in even asking for a return-postcard?

In any event, a return-postcard only serves as proof that a certain number of pages were delivered to the PTO on a certain date, and Mr. Wood does not dispute that; the return-postcard cannot serve as proof as to what was written on those pages.

4. Also, in the Dismissal, Mr. Wood details some highlights of the Express Mail procedures. Again, we feel this is rather irrelevant, since we are not invoking the Express-Mail procedure in this case. However, we make the following comments.

Applicants who reside in locations that do not have access to the USPS cannot, of course, take advantage of the Express Mail procedures.

In any event, the Express Mail procedure (like the return-postcard procedure) only serves as proof of element (a), i.e that an envelope was deposited with the USPS on a certain date; the procedure cannot serve as proof of element (b), as to what was contained in the envelope.

Therefore, even if the applicant relies on the Express Mail system to prove the date an envelope was deposited with the USPS, still the applicant must have another system in place, by which they can prove what was in the envelope.

5. Incidentally, we note Mr. Wood's comment (lines 6-10 of page 3 of the Dismissal) that Ms. Owen's log book entry was not made after and within one day of deposit, as would have been required if we had filed the

application under Rule 1.10.

We point out that the aspects set out in Rule 1.10(d) again go to establishing element (a), i.e to proving that an envelope was deposited with the USPS on the day in question. Ms. Owen's statement regarding her log-book entry, by contrast, was concerned with establishing element (b), i.e with proving what was in the envelope.

6. The PTO having accepted that we did indeed deposit an envelope at the PTO on 16 September 2003 (element (a)), we now turn to the proof we have adduced regarding element (b), namely proving just what was in the envelope.

7. There is a great deal in the Rules, and in the MPEP, as to what an applicant must do in order to prove element (a), that an envelope or papers was indeed submitted on a particular date. But there is nothing in the Rules or MPEP to indicate what steps the applicant must take in order to prove element (b), i.e to prove just what was in the now-missing envelope, and/or what was written on the now-missing papers. The element (b) proof evidently is left to the applicant, and to the good judgement of the attorneys in the Office of Petitions.

8. In the Dismissal, Mr. Wood says he finds Ms. Owen's affidavit not persuasive. Mr. Wood's reason for this finding is that the affidavit depends on personal remembrances, made long after the event. Mr. Wood cannot see why filing this application would stand out in such detail in Ms. Owen's memory, given that she prepared and mailed similar papers routinely.

We could not take issue with Mr. Wood's reasoning, if Ms. Owen had declared something like: *Ah yes, I remember that one now. I now remember putting all twenty-six pages of the specification into the envelope. I also now remember the declaration and the covering letter. I don't know why, but it stands out in my memory, now, four months later.* If she had declared something like that, Mr. Wood's scepticism must carry the day.

We invite the Office to re-read Ms. Owen's declaration, and to note what

she actually did declare. In §5 of her declaration, Ms. Owen describes the office procedure she routinely follows, when she comes to file a new US patent application. One of the elements of that routine procedure is to make sure she has, or makes, a copy of every paper going into the FedEx envelope, and to put the bundle of copies in our case-file. Another element is to make an entry in the log-book, confirming that she has checked that the papers in the FedEx envelope are complete, and that we have a copy of them in our case-file. In her §6, she declares: The fact that the new patent application is listed in the log-book means that I checked that the cover letter, data sheet, signed declaration, and specification were indeed placed in the Federal Express envelope. That is exactly what I do check for.

Having described the regular routine procedure, Ms. Owen declares, in §6: *I state that I followed the above procedure in this case.* She also declares, in §8: *I state that the fact that an item is recorded in the log book is proof that I did check that I had placed the item in the Federal Express package.* That is what the procedure is for.

9. I am a registered practitioner, and I state that Ms. Owen is highly competent and conscientious. But even an averagely-conscientious person, especially one with many years' experience in the patent field, is competent to make such a declaration.

It is not a question of memory. Ms. Owen does not now remember this specific case. What she declares is that she did follow the routine procedure. That is a perfectly reasonable declaration for a person to make. She would remember if she had not followed the routine procedure.

She states that the presence of the log book entry confirms that she did check the contents of the FedEx envelope, at the time. That is what the log book entry is for.

It is our position that Ms. Owen's declaration does prove that the patent application papers were in the FedEx envelope, when she handed the envelope to the FedEx clerk. Thus, we feel we have established element (b).

10. As mentioned, Mr. Wood accepts that we have already established

element (a). But there still might be one slight questionmark regarding element (a), namely that the Fedex package as signed for by the PTO employee might not have been sealed, i.e the envelope might have been damaged or opened (and of course the PTO would not be responsible for that). But Fedex have a routine regarding damaged packages. If for some reason the package is not delivered intact (e.g if it had been opened for security reasons), Fedex would tell us so. They do not inform us when the package is delivered intact; they only do inform us when the package has been damaged or opened.

There is no indication that the envelope, as signed for by M.Asfaw of the PTO, was anything but perfectly intact. We note that the other items included in that same envelope were received OK by the PTO. Only this one has been mislaid.

11. In view of the above, we feel we have established all the elements needed to prove that the envelope signed for by the PTO, on 16 September 2003, did indeed contain the full patent application papers on this case, and therefore we are entitled to that filing date.

12. We also ask for the petition fee to be refunded. (If losing a patent application is not a USPTO error, what is?)

Submitted by:

  
Anthony Asquith  
Regn 32373  
Agent for the Applicant

Enclo: (none)

RECEIVED  
CENTRAL FAX CENTER

MAY 28 2004

OFFICIAL

# ANTHONY ASQUITH

**Patent Attorney**

Anthony Asquith BSc  
Registered Patent Agent  
(Canada and USA)  
Chartered Patent Attorney (UK)  
European Patent Attorney

Office and  
Postal Address:

Anthony Asquith & Co  
#28 - 461 Columbia Street W  
Waterloo, Ontario  
Canada N2T 2P5

## FACSIMILE TRANSMISSION

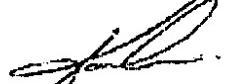
Please Note: If you are not the recipient named below, you are requested to treat this fax transmission as the confidential, private correspondence of the named recipient.

## FACSIMILE TRANSMISSION TO US PATENT OFFICE

Fax No: 703 872 9306

Certificate: I hereby certify that this paper is being fax-transmitted to the Patent and Trademark Office today, 28 May 2004.

signed



Karen Owen

=====

### Attention of Office of Petitions

Senior Petitions Attorney: Douglas I. Wood  
Phone: 703 308 6918

=====

No of pages including this page: 6

=====

Serial No: 10/757,733

Our Ref: 616-76US

Applicant: SHELP et al.

=====

### REQUEST FOR RECONSIDERATION OF DECISION DISMISSING PETITION

This is a request reconsideration of the decision dismissing petition, issued 07 May 2004.

Please refer to the attached pages.

Submitted by:



Anthony Asquith

Regn 32373  
Agent for the Applicant

Telephone:

519 746 6732

Enclo:

request for reconsideration (5 pages)

Faxsimile:

519 888 6093